In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 420

BANCO DO BRASIL, S.A., PETITIONER

v.

A. C. ISRAEL COMMODITY CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES

By order of the Court, dated November 18, 1963, the Solicitor General was invited to express the views of the United States with respect to this case. After consultation with the Department of State and the Department of Treasury, we are of the view that this case does not present a problem requiring resolution by this Court.

The basic issue presented is whether any national policy of the United States, arising out of or related to Article VIII, Section 2(b) of the Bretton Woods Agreement, *requires* the courts of New York State to enforce a tort claim made by a signatory of the agreement against defendants who allegedly conspired to defraud such signatory by illegally circumventing its

717-042—63

foreign exchange laws and regulations.[1] The relevant provision of the agreement (60 Stat. 1411) is as follows:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

In the present case, the Court of Appeals of the State of New York held that the above clause obliged courts of this country "to withhold judicial assistance to secure the benefits of such contracts"—*i.e.*, exchange contracts which are contrary to a member's exchange control regulations—but that it did not "imply an obligation to impose tort penalties on those who have fully executed them" (Pet. 3a–4a). We agree that in the absence of any further assertion of a national policy respecting enforcement of foreign exchange regulations—whether by international agreement, statute or otherwise—state courts are not required by federal law to go beyond the express terms of the agreement and may, conse-

[1] This memorandum does not discuss the threshold jurisdictional question whether 28 U.S.C. 1257(3) applies—an issue on which we express no view.

quently, refuse to entertain suits based on alleged violations of a signatory's exchange regulations.[2]

1. Neither the language nor the history of Article VIII, Section 2(b) of the Bretton Woods Agreement supports the view that the provision imposes on the domestic courts of member nations an obligation to entertain suits of this nature. The agreement expressly provides only that exchange contracts which violate a member's exchange control regulations are unenforceable. The Executive Directors of the International Monetary Fund, who are the official interpreters of the agreement's provisions (Article XVIII (a), 60 Stat. 1423), have construed Article VIII, Section 2(b) as applicable to contract actions (14 Fed. Reg. 5208), but have not suggested that it reaches any further. In this respect, it is also relevant to observe that when the agreement was drafted, numerous proposals for broadening the enforcement provision of Article VIII, Section 2(b) were considered and rejected. Among these was one which would have made certain exchange transactions which violate the exchange control regulations of any member an offense in the territory of other members. See 1 Proceedings and Documents of the United Nations Monetary and Financial Conference, pp. 334, 341.

Although the second sentence of Article VIII, Section 2(b) authorizes member countries to engage in further co-operative efforts to make exchange control

[2] We express no view on New York's public policy regarding the enforcement of foreign revenue laws and its applicability to the present case, both of which are matters of state law only. Nor do we express any view on the exchange regulations in question.

regulations more effective, such steps are not obligatory but may be the subject of "mutual accord." The United States has not entered into any agreements under this provision. This clause is not self-operative and cannot be said to impose any additional obligations on the courts of member nations.

2. Petitioner contends that notwithstanding the limited scope of Article VIII, Section 2(b), the United States' adherence to the Bretton Woods Agreement *per se* manifests an overriding national policy favoring the enforcement of foreign exchange control regulations, so that the New York courts were compelled to entertain petitioner's tort actio This implied obligation is not sustained by the meaning given to the agreement by the governmental agencies "particularly charged with their negotiation and enforcement," whose construction "is given great weight." *Kolovrat* v. *Oregon,* 366 U.S. 187, 194; see *Factor* v. *Laubenheimer,* 290 U.S. 276, 294–295. Both the Department of State and the Department of Treasury have advised us that, in their view, with which we concur, the bare acceptance of the Bretton Woods Agreement did not establish a national policy requiring the courts of the State of New York to entertain this suit.

3. This Court's conclusions regarding the effect of the Bretton Woods Agreement, as announced in *Kolovrat* v. *Oregon,* 366 U.S. 187, 197–198, are not to the contrary. All that was held in *Kolovrat* was that the Bretton Woods Agreement constituted an expression of national policy on the subject of foreign exchange, which the State of Oregon was not at

liberty to disregard. The claim rejected in *Kolovrat* as inconsistent with this established national policy was based on the assumption that a Bretton Woods member might fail to meet obligations which were *expressly* set out in the agreement. No question as to the scope of an obligation imposed by the agreement was involved. The present case, unlike *Kolovrat,* concerns the meaning to be given to a particular provision in light of the United States' adherence to the agreement.

Since the language and history of the provision is explicit, and since the governmental agencies primarily concerned are not of the opinion that adherence to the agreement *ipso facto* establishes the overriding policy urged by petitioner, we suggest that, from the standpoint of the United States, there is no impelling need for review by this Court.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JANUARY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1963